FILED
AUG 7 1959
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1959

No. 10

UNITED STATES OF AMERICA,

Appellant,

v.

SEABOARD AIR LINE RAILROAD COMPANY,

Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR SEABOARD AIR LINE RAILROAD COMPANY

Bryce Huntsucker, IV
Lewis P. Booker
Of Counsel for Seaboard Air Line Railroad Company

Hughes, Williams, Gay,
Moore & Boykin
Seaboard Building
Norfolk 12, Virginia

TABLE OF CONTENTS

	Page
Question Presented for Review	1
Statement of the Case	2
Summary of Argument	5
Argument	10
I. The Decision of the Court of Appeals for the Fourth Circuit Is in Accord With the Previous Decisions of This Court	10
II. The Courts Have Properly Observed the Intention of Congress in Interpreting That Portion of the Safety Appliance Act Requiring Any Train to Have Connected Power Brakes to Exclude Switching Movements	17
III. The Lower Courts Are Properly Applying the Tests Laid Down by This Court in Its Previous Decisions to Determine When the Act Applies; the Court of Appeals for the Fourth Circuit Properly Applied Those Tests in the Case at Bar	22
IV. Whether a Particular Movement Is a Transfer Movement or a Switching Movement Is a Question To Be Determined by the Trier of Fact	26
Conclusion	33
Certificate of Service	35

TABLE OF CITATIONS

Cases

Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940) 20, 21

Louisville & Jeffersonville Bridge Co. v. United States, 249 U. S. 534 (1919) 5, 14, 24

United States v. Chicago, Burlington & Quincy R. Co., 237 U. S. 410 (1915) 5, 13, 14, 18, 24

Page

United States v. Chicago, Burlington & Quincy R. Co., 199 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953) 23, 28

United States v. Elgin, Joliet & Eastern Ry. Co., 182 F. 2d 1 (7th Cir. 1950) 24, 25

United States v. Erie R. R., 237 U. S. 402 (1915) 5, 6, 8, 11 12, 13, 18

United States v. Great Northern Ry. Co., 73 F. 2d 736 (9th Cir. 1934), *cert. den.* 295 U. S. 752 (1935) 16, 17, 21, 22, 23

United States v. New York, Chicago & St. Louis R. Co., 77 F. 2d 215 (7th Cir. 1935) 23

United States v. Northern Pacific Ry. Co., 254 U. S. 251 (1920) 5, 8, 15

United States v. Panhandle & Santa Fe Ry. Co., 203 F. 2d 241 (5th Cir. 1953) 24

United States v. South Buffalo R. Co., 168 F. 2d 948 (2d Cir. 1948), *cert. den.* 335 U. S. 870 (1948) 24

United States v. Terminal Railroad Association of St. Louis, 260 U. S. 884 (7th Cir. 1958), *cert. pending* 25, 26

United States v. Texas & New Orleans R. Co., 13 F. 2d 429 (S. D. Tex. 1920) 7, 15, 21

United States v. Thompson, 252 F. 2d 6 (8th Cir. 1958) 24

Statutes

Act of March 2, 1903, c. 976, 32 Stat. 943 2

Title 45, United States Code, Sections 1-10 2

Other Authorities

56 Congressional Record 2521, 2522 20

Federal Rules of Civil Procedure, Rule 52 30

Interstate Commerce Commission Order of June 6, 1910 (49 C. F. R. 1324) 2

Standard Code of Operating Rules, American Association of Railroads (Revised to October 1, 1953), p. 11 18

In the

Supreme Court of the United States

October Term, 1959

No. 10

UNITED STATES OF AMERICA,
Petitioner

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR SEABOARD AIR LINE RAILROAD COMPANY

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the Honorable Sterling Hutcheson, Judge, United States District Court for the Eastern District of Virginia, who was affirmed by the United States Court of Appeals for the Fourth Circuit, erred in finding that four movements of railroad cars on March 5 and 6, 1956, operating without power, or air, brakes in Seaboard Air Line Railroad Company's Hopewell, Virginia, yards were not "trains" within the

prohibition of the Safety Appliance Act and I. C. C. order against the operation of "any train" with less than 85% of the cars in such train equipped with "power or train brakes."

STATEMENT OF THE CASE

The United States of America, petitioner, brought suit against Seaboard Air Line Railroad Company in the United States District Court for the Eastern District of Virginia on June 11, 1956, alleging three violations on March 5 and one violation on March 6, 1956, of Title 45, U. S. Code, Sections 1 through 10, inclusive, and seeking to recover the statutory penalty of $100 for each violation. This portion of the U. S. Code is a codification of a 1903 amendment to the Safety Appliance Act, the amendment being the Act of March 2, 1903; c. 976, 32 Stat. 943. The amendment requires that 50% of the cars have their power brakes operating on any train required by the Safety Appliance Act to be equipped with power brakes. The amendment also gives the Interstate Commerce Commission authority to increase the percentage of cars on any train which must have their power brakes used and operating. Pursuant to this authority the Commission by order dated June 6, 1910 (49 C.F.R. 132.1) increased the minimum percentage from 50% to 85%.

Seaboard in its answer admitted the four movements alleged in the Government's complaint had occurred but denied the movements were of such nature as to require connected and operating air brakes. After hearing the witnesses in open court January 31, 1957, Judge Sterling Hutcheson, sitting without a jury, found the movements in question were *not train movements but switching operations* and therefore not subject to the air brake requirements of the Safety Appliance Act (R. 7).

Upon appeal by the Government to the United States Court of Appeals for the Fourth Circuit that court affirmed the trial court, Chief Judge Sobeloff dissenting as to three of the four movements but concurring as to the fourth (R. 64-81).

The Government then filed a petition for writ of certiorari. The writ was granted January 12, 1959 (R. 83).

The four movements in question are correctly described in the statement of facts in the Government's brief so far as it goes. However, the statement does not adequately describe the nature of the area in which the operation took place and the operation's crucial factors as to the applicability of the Act.

Seaboard's Hopewell yard consists of a classification yard located at the western end of the city and a lead track running eastwardly from the classification yard for approximately two miles to its termination at the Allied Chemical Corporation plant at the eastern end of the city (Appellate Exhibit 1 attached hereto; Defendant's Exhibit 2 below). There are nine spur tracks cutting off the lead track between the classification yard and the Allied plant. One of the spur tracks is an interchange track with the Norfolk & Western Railway Company; the rest run to the industrial plants in Hopewell. The purpose of Seaboard's Hopewell yard is to provide freight service for these industries in Hopewell, and its operation consists of switching cars between the classification yard and the various spur tracks (R. 44-46).

Seaboard's main line lies to the west of Hopewell. Bellwood, on the main line, is the western terminus of the spur line from Seaboard's main line into Hopewell (R. 9). All incoming trains come from Bellwood to Hopewell and terminate at the Hopewell classification yard and do not run through the town. At the classification yard the switch

engines and crews take over and break up the incoming trains and switch and block the cars to the various industries to which they are consigned in Hopewell.

Seaboard has no passenger trains into Hopewell and, of course, no through trains, since Hopewell is the end of the line, the James River being immediately west of the Allied Chemical plant and the Appomattox River to the north (R. 45, 46). There are no scheduled movements over any of the tracks involved. All movements are under the control of Seaboard's Hopewell agent (R. 48, 49).

Seaboard stopped connecting the air brakes January 10, 1956. But it was not until March 5 and 6, 1956, and then only as the result of a complaint by the Brotherhood of Railway Trainmen, that two Interstate Commerce Commission inspectors visited the Hopewell yard and observed the four movements complained of. They also observed several other movements over the same tracks but did not report them as violations because they were under one mile in length (R. 23, 26, 35, 36). In all other respects they were identical with the movements in question.

They made no inspection of the immediately adjacent and parallel tracks and yards of the Norfolk & Western Railway Company and the cars thereon where movements similar to those complained of in this case were taking place at the same time without connected air brakes. They did not even bother to observe whether the air brakes were connected on the Norfolk & Western (R. 31, 63).

If Seaboard is required to use air brakes in its operations in Hopewell, it will materially delay operations there and will entail an additional expense of at least $30,000 a year for extra crews (R. 51).

SUMMARY OF ARGUMENT

I.

One of the requirements of the Safety Appliance Act is that a certain percentage of power brakes be connected and ready for operation on "any train." Opinions have been handed down by this court in four previous cases involving this requirement. These four cases are *United States* v. *Erie R. R.*, 237 U. S. 402 (1915), *United States* v. *Chicago, Burlington & Quincy R. R.*, 237 U. S. 410 (1915); *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U. S. 534 (1919); and *United States* v. *Northern Pacific Ry. Co.*, 254 U. S. 251 (1920). These cases will hereafter be referred to by the name of each of the respective railroad defendants.

In each one of these cases this Court had the opportunity to say that when the Act said "any train" it meant any combination of locomotive and cars, no matter how many or how few cars were involved, no matter how long or short a distance travelled, no matter what the type of movement, and no matter what work was being done.

This Court has not chosen to make such a sweeping definition of the word "train." It has, instead, properly recognized as being without the operation of the Act ". . . the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up . . .", *Erie* case, *supra*, p. 408, and those movements ". . . where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains . . .", *Northern Pacific* case, *supra*, p. 254.

This Court has also said that ". . . the controlling test of the statute's application is *the essential nature of the work done* . . .", (italics supplied), *Burlington* case, *supra*, p. 413 —and if the work done is assembling cars into outgoing

trains or breaking up incoming trains, then the Act does not apply, as the *Erie* case pointed out (p. 408):

> "[T]he various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains, which have completed their run are broken up . . . are not train movements but mere switching operations and so are not within the air brake provision. . . ."

In each of these four cases the movements were determined to be transfer movements; that is, a movement of cars from one yard to another where, upon reaching their destination, the cars were turned over to another company or were sent to some further destination instead of having reached the ultimate consignee of the car.

But the cars in the movements now before the Court were switched from the classification yard and delivered to the ultimate consignees or were being picked up from the consignors' spur tracks for movement to the classification yard. After reaching the classification yard the switching continued and they were placed on tracks on which trains to run from Hopewell were being made up to go to Bellwood and thence to points north and south on the main line. The whole movement must be considered: its purpose, origin, and destination—not simply a portion of it. The essential nature of the work done cannot be determined merely by looking at the cars as they are moving; what happens to the cars when they stop moving is the test.

II.

The Government appears to contend that this Court's previous decisions as to what constitutes a train have carved an exception into the Safety Appliance Act, the purpose of

that Act being to make railroad operations safer for employees, passengers and the general public. The Government suggests that Congress could not possibly have intended the Court to make such exception in a safety statute where no statutory exemption was created. However, regardless of the purpose for which the Act was passed, it must be construed by the courts according to the language actually used in the Act.

This is not the case of judicial legislation, the Government implies. This Court, by its decisions, has not created an exemption in the Act. To the contrary, it has done what it was required to do: this Court's prior decisions have simply defined the word "train" as used in the Act, something Congress failed to do. To give the Act any efficacy whatever, the word "train" must be defined. Since Congress failed to define the term it became this Court's duty to do so.

This Court's definition of the word "train" was made more than forty years ago. Congress has not seen fit to change that definition, although there has certainly been abundant time to do so or, as the Government maintains, the definition is so contrary to Congressional intent. Furthermore, it has been over thirty years since the first lower court decision holding a particular movement a switching movement and not within the Act was announced, *United States v. Texas & N. O. R. Co.*, 13 F. 2d 429 (S. D. Tex. 1926). Since that decision, over a period of years, many cases have been decided holding given movements to be switching movements and exempt from the Act. If those cases had represented an erroneous reading of Congressional intent, Congress could have redefined the word "train." Congress having failed to do so the inescapable conclusion is that the term has been properly defined and the definition

properly applied by the courts. At this late date it is to Congress and not to the courts that Government must turn if a change in the definition of the word "train" is to be made.

III.

While it has been nearly forty years since the Court has considered a case arising under this section of the Act the lower Federal courts have frequently had this problem before them. Over this period the various lower courts have followed the ruling made by this Court in the *Erie* and *Northern Pacific* cases, *supra*, and have looked to the essential nature of the work in any given movement to determine whether that movement is subject to the Act.

Where it appears that the nature of the work done is the breaking up of trains and the switching of their cars to industrial spurs, or the reassembling of cars from various points in a yard to a central point where the cars are made up into a train for a road run, the courts have held that the movement is a switching movement not subject to the Act. This type of movement is precisely the type of movement which took place in Seaboard's Hopewell yard on March 5 and 6, 1956, and the District Court and the Court of Appeals properly held those movements without the purview of the Act.

On the other hand, the lower courts have been just as diligent to place transfer movements, that is, those movements where strings of cars are moved intact from one terminal to another or one yard to another, within the purview of the Act. Seaboard's movements in Hopewell are not transfer movements, for once a car in Hopewell is switched to its consignee it is at the end of its journey and is then loaded or unloaded and is not taken on a further journey.

The test of "the nature of the work done" established by this Court years ago is obvious, practical and workable. It has been properly applied by the lower courts in the past; it was properly applied by the lower courts in this case; and it requires no modification or revision now by this Court.

IV.

The Government, after first maintaining that there is no basis either in the legislative history or in the language of the Act to justify any exceptions to its coverage, nonetheless appears to accept, albeit reluctantly, the distinction made by the courts between those movements which because of their nature are subject to the Act and those movements which because of their nature are not. Having accepted this distinction the Government then maintains that the movements involved in this case were transfer movements and not switching movements.

The Government in its brief is in reality setting up a strawman to knock down. The Government dwells at some length upon the propositions that a movement can be subject to the Act even though main line tracks are not used and that a transfer movement is subject to the Act. We agree with those propositions in the abstract, but what the Government fails to do, and indeed cannot do, is apply those principles to this case. The Government talks about matters not germane to this case, while the facts of this case show the Act does not apply to the movements at bar.

The ultimate decision as to whether a particular movement is a transfer movement or a switching movement is a matter for the trier of the facts. In this area a decision in one case carries little weight as a rule for decision in another because the facts in each particular case vary so greatly. Each case must instead be decided on its own facts. The

decision of the trier of the facts below, sitting without a jury, is entitled to the same weight as a jury verdict, and such verdict may not be set aside unless clearly erroneous and without evidence to support it. The decision of the District Court, far from being clearly wrong, is clearly right and should be upheld by this Court."

ARGUMENT

I.

The Decision of the Court of Appeals for the Fourth Circuit Is in Accord With the Previous Decisions of This Court

When the Court of Appeals for the Fourth Circuit held that the four movements complained of in this case were switching movements and not subject to the air brake requirements of the Safety Appliance Act, that court properly relied upon, and applied, the prior decisions of this Court.

In each of the four cases previously decided by this Court the movements have been held to be within the Act. This Court has never, however, said that *any* movement of a locomotive and car or cars is a train and thus within the Act. It merely said that the movements there involved were trains. The Court was careful to point out in each of those decisions that, although the movements before it were trains, not all movements are trains. Because this Court has made no sweeping definition of "any train," as that expression is used in the Safety Appliance Act, it is necessary to look at the movements in those cases in some detail to see how they in fact differed from the movements in the case at bar, and how the language of those decisions applies to this case.

Seaboard's Hopewell yard consists of a classification yard at the west end of town where inbound trains are broken up.

In this yard the cars are then shifted so as to arrange them for convenient delivery to the Norfolk & Western interchange and the industries located on the nine other different spur tracks lying along the two miles between this yard and the Allied Chemical plant. Outbound cars are picked up at the consignors' spur tracks and Norfolk & Western interchange and assembled into trains for movement from the yard to the main line at Bellwood. All that Seaboard does in Hopewell is to switch cars to and from the classification yard and the industrial plants. No cars are transferred from the classification yard to another yard to be hauled away. When an incoming car is switched from the classification yard it is bound for its ultimate destination (never more than two miles away) where it will be unloaded or loaded. When a car coming from Seaboard's main line reaches the Hopewell classification yard it is truly at the end of the line, for there is no track beyond Hopewell, and cars only leave the classification yard to be switched to their ultimate destination—the industrial siding to which the cars are consigned. Outgoing cars are handled in the reverse manner.

In the *Erie* case, *supra*, the Erie maintained extensive yards in New Jersey just across from New York City. The movements complained of were between three yards, known as the Jersey City, Weehawken and Bergen yards, roughly situated as the outer points on a Y, lying from two to three and one-half miles apart. Movements between these yards were made over main line tracks. Cars hauled in the movements complained of to Jersey City and Weehawken from Bergen were forwarded to points around New York Harbor; cars hauled from Jersey City and Weehawken were forwarded to western points. In other words, in none of the movements involved in the *Erie* case had the cars reached their ultimate destination; they were being *transferred* from one yard to another for continuing further shipment else-

where. To the contrary the cars distributed by Seaboard in Hopewell are carried a short distance between a classification yard and an industrial plant where the cars are either unloaded or loaded or assembled into a train in the classification yard from there to be transferred to Seaboard's main line at Bellwood.

In the *Erie* case at p. 406, this Court said:

> "We cannot assent to the view that the yards at Jersey City, Weehawken and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from two to three and one-half miles apart, *are not so linked together that cars may be moved from one to another with the freedom which is usual and necessary in intra-yard movements*, and are in actual practice treated as separate yards." (Italics supplied)

While the Erie might not have the freedom of movement usual and necessary in intra-yard movements in Jersey City, Weehawken and Bergen, Seaboard certainly does in Hopewell. The only engines ever moving in Seaboard's Hopewell yard are switch engines picking up loaded or setting out empty cars for the consignor or consignee. There are no through trains within the yard limits, either passenger or freight, simply because there are no through tracks.

On the state of facts in the *Erie* case this Court found those movements subject to the Act. The Court said (pp. 407-8):

> "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and

cars which have been assembled and coupled together for a run or a trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. *But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision. . . .*" (Italics supplied)

It would be hard to describe the movements complained of in this case more succinctly and accurately than in the italicized language set forth above from the *Erie* case. Incoming trains are brought into the classification yard and are broken up and switched to the various consignees; cars are moved from the various industrial sidings to the classification yard where they are assembled and coupled into outgoing trains. That is the extent of the movements complained of by the Government. Then, and only then, are they made up into a train within the sense of the Act. The court below clearly properly relied on the *Erie* case in holding the movements here outside the Act.

In the *Burlington* case, *supra*, defendant maintained freight yards in Kansas City, Mo., on both sides of the Missouri River. These yards were connected by a track over which main line passenger and freight traffic travelled. Cars were moved from one yard to the other where they were dispatched to their ultimate destination, either on defendant's road or that of other carriers. These movements were held to be transfer movements and subject to the Act. The movements in the *Burlington* case are certainly completely dissimilar to those involved in the case at bar. In our case the cars were not transferred from one yard to

another over main line tracks but were simply being switched within the yard after the train had arrived and been broken up to the consignees or from the consignors to the tracks on which outgoing trains were made up.

It was in the *Burlington* case that this Court announced the test of the applicability of the Act. The Court said there (p. 413):

> ". . . Neither is it material that the men in charge were designated as yard or switching crews, for *the controlling test of the statute's application lies in the essential nature of the work done* rather than in the names applied to those engaged in it." (Italics supplied)

We submit this test is clear and free from ambiguity and was properly applied by the court below when it held (R. 70) that the nature of the work done at Hopewell is clearly switching.

That the nature of the work done is the test of the Act's applicability was emphasized by this Court in its next decision on the Act, the *Louisville & Jeffersonville* case, *supra*, where it was said (pp. 539, 540):

> "This case falls within the scope of *United States* v. *Erie R. R. Co.* . . . and *United States* v. *Chicago, Burlington & Quincy R. R. Co.* . . . in the latter of which it is said that 'the controlling test of the statute's application lies in the essential nature of the work done.' ".

The *Louisville & Jeffersonville* case involved movements of cars between the Chesapeake & Ohio and Big Four railway systems at one end of the Bridge Company's yards and the Illinois Central system at the other end. These movements were obviously transfer movements between two railroads by a third and in nowise begun or terminated with

the Bridge Company. While the movements are clearly distinguishable from those involved here, the case nevertheless has value as a precedent because of this Court's reiteration that the test of the Act's application is in the essential nature of the work done.

The last case heard by this Court, the *Northern Pacific* case, *supra*, was briefed and argued almost entirely on the proposition that the Act does not apply to movements which do not take place on main line tracks. The movements in question were transfer movements between two separate yards in Duluth over a distance of four miles, totally dissimilar from the movements at bar. This Court, holding for the Government, said that movement over main line tracks was not prerequisite to the Act's application (p. 254):

> ". . . But there is nothing in the act which limits the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to 'all trains . . . used on any railroad engaged in interstate commerce.'"

We cheerfully agree that whether main line tracks are used or not is not controlling. In some cases movements on other than main line tracks are held to be subject to the Act, while in others movements on main line tracks are held not to be subject to the Act. For example, in *United States v. Texas & N. O. R. Co.*, 13 F. 2d 429 (S. D. Tex. 1926), District Judge Hutcheson, now Chief Judge of the Court of Appeals for the Fifth Circuit (and incidentally a first cousin of the trial judge in this case), held the movements in that case were switching movements despite the fact that they took place on main line tracks. Judge Hutcheson, following this Court's mandate and looking to the essential

nature of the work done, found that the movements whereby cars were moved from a yard and distributed to various industrial spurs along the main line were switching movements. This is precisely the case now before the Court except that the movements were not on a main line but at the end of the line beyond which there were no tracks.

There can be no real dispute that the essential nature of the work done is the controlling test and that if the work done is switching the Act does not apply. The Government seeks to avoid the logical result of applying this rule to Seaboard's Hopewell movements by urging that what was done with the cars before or at the end of their runs is immaterial. But this cannot be so, for how else is one ever able to tell what is the essential nature of the work being done unless the whole movement, from beginning to end, is considered? A group of cars passing a given point on a given track might be assembled and made up for a road run and subject to the Act, or it might simply be in the process of being switched to an adjacent track and not subject to the Act. The *whole* movement must be considered, and the whole movement in this case is a switching movement.

In *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (9th Cir. 1934), *cert. den.* 295 U. S. 752 (1935), the Government urged the court to consider only a portion of the work done by a switching crew in a particular movement to determine whether the Act applied. The court rejected the Government's position, saying, at p. 739:

> "Applying the criterion evolved from the decisions of the Supreme Court of the United States that 'the controlling test of the statute's application lies in the essential nature of the work done' the facts warranted the finding that the crew at the time was engaged in the assembly of cars by means of a series of switching

movements, and that at the time complained of the cars had not been assembled into a train to be transferred as such to any particular point. *The government sought to establish a "train movement" by presenting only a part of the work being done by the engine and crew, and disassociating it from the surrounding circumstances.* . . .

"*Had the government inspectors continued to observe the engine and crew in order to ascertain the 'essential nature of the work being done,' they would have learned, as the undisputed testimony shows, that after the engine had transported the cars to the point where the inspectors had discontinued their observations, the switching of cars was resumed.* . . ." (Italics supplied)

Looking at these movements as a whole and not in isolated segments it is clear, we submit, that the essential nature of the work done was switching and that the court below properly ruled that the movements were not subject to the Act.

II.

The Courts Have Properly Observed the Intention of Congress in Interpreting That Portion of the Safety Appliance Act Requiring Any Train to Have Connected Power Brakes to Exclude Switching Movements.

There is no question that the Safety Appliance Act requires "any train" to have connected air brakes. There is no question that the courts have held certain movements of engines and cars not to be "trains" and therefore not subject to that requirement. It does not follow from this, however, that the courts have disregarded the Act and the will of Congress.

The Government argues in its brief that the Act excludes "trains composed of four-wheel cars" and "trains composed

of . . . standard logging cars. . . ." It must follow, according to the Government, that these are the only exceptions to the Act and that there is no authority for excluding any other type of train from the Act's operation. But it is to be noted that the Act refers to *trains* of four-wheel cars and logging *trains*. The fact that Congress has seen fit to exclude *trains* composed of certain types of cars from the Act still leaves unanswered the question: What is a train? Congress having failed to define the word train, it becomes the duty of the courts so to do.

If "train" were a word which had only one meaning, and that meaning were understood by everyone, there would be no need for a judicial definition of the term. But there has been considerable controversy in the past as to what a train is, and judicial definition has been necessary.

In the *Erie* and *Burlington* cases, *supra*, the first cases to reach the Supreme Court on this point, the railroads in their briefs urged the Court to accept as a definition of "train" that used by the American Association of Railroads:

> "Train. An engine or more than one engine coupled, with or without cars, displaying markers." *

The Court refused to accept that definition of a train, even though that was the definition known and understood in the railroad industry. Instead, the Court by applying common sense and considering the intent of the Act evolved the definition of the word train set forth above. The fact that the American Association of Railroads defines a train one way and the courts another indicates the diversity of opinion as to the meaning of the word and points up the necessity for this Court's having to define the term in the

* Standard Code of Operating Rules adopted by the Association of American Railroads (Revised to October 1, 1953), p. 11.

absence of any definition by Congress. That definition is logical and workable and was correctly applied by the court below in this case.

The Government appears to prefer the opinion of I. C. C. Inspector Meyrick, who testified in this case, as to what constitutes a violation of the Act, to the opinion of the courts below. Yet Meyrick's own testimony indicates how vague and uncertain he was as to the proper application of the Act (R. 32-35):

> Q. Mr. Meyrick, are there any instructions to you from the Interstate Commerce Commission as to what is to determine whether a movement is a switching movement or a train movement?
>
> A. As you have pointed out, it is very poorly defined, but it is our opinion that any movement of a substantial number of cars between two points with stops en route to set out or pick up would be deemed a train movement.
>
> * * *
>
> Q. . . . Are there any rules or regulations or anything published by the Interstate Commerce Commission for your information?
>
> A. No, sir.
>
> Q. Or for the information of the railroads?
>
> A. No. For that matter it is my understanding that these cases are based upon past court decisions, and that is about all I have as a guide.
>
> * * *
>
> Q. As I understand it from reading your report, you disregarded the movements to Hercules and Celanese because they were under one mile in length?
>
> A. They were short movements, yes.
>
> Q. At what distance, then, does a movement become a train movement and not a shifting movement?
>
> A. There again there is no hard and fast rule.

Q. There are shifting movements of two miles in length, are there not?

A. There could be.

The Government further contends that the Act was enacted primarily for the safety of railroad employees and that the court below and the other courts which have found certain movements to be outside the Act have by excluding those movements from the Act ignored the intent of Congress to protect railroad workers.

The error of this position is demonstrated by the debates on the Act prior to its enactment. It was pointed out and meticulously debated in Congress that the Interstate Commerce Commission safety records relied on by the House committee showed that the greatest number of accidents to railroad employees from any one cause were from switchmen having to go between cars to couple up air brakes. The requirement of connecting air brakes was described as for the safety of the brakemen on the cars but at the expense of the safety of the switchmen on the ground (36 Cong. Rec. 2521, 2522). In making the Act applicable solely to "trains" it seems obvious that it was the intent of Congress to avoid subjecting switchmen to unnecessary risks by not requiring air brakes to be coupled in switching movements.

The most persuasive argument, however, that the Act is being construed according to the will of Congress is the absence of any amendatory legislation in the forty year period since this Court announced its decisions as to the applicability of the Act. Congress has had forty years to define the word train in the Act in any manner it desired if this Court's definition was erroneous. The failure of Congress to act is certainly an implied recognition that this Court's construction is the correct one.

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940),

this Court was called upon to decide the applicability of the Sherman Act to certain labor union conduct. The question arose whether Congress had acquiesced in previous decisions on the same point by not enacting legislation to correct the interpretation this Court placed on that aspect of the Sherman Act. This Court held (pp. 488-9):

> "... The long time failure of Congress to amend the Act, after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. ..."

The Government cannot be heard to say that, although this Court's prior decisions have been acquiesced in by Congress, the decisions by lower courts holding particular switching movements outside the Act have not. A third of a century ago a district court held a switching movement outside the Act, *United States* v. *Texas & N. O. R. Co.*, 13 F. 2d 429 (S. D. Tex. 1926); a quarter of a century ago the Ninth Circuit found a switching movement outside the Act, *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (1934), *cert. den.* 295 U. S. 752 (1935). Since that time numerous other decisions, discussed *infra*, have found certain movements to be outside the Act.

Congress has certainly had abundant time to indicate its disapproval of these decisions if in fact they were erroneous. The only conclusion is that the Act has been properly construed by the courts. If the United States or the Interstate Commerce Commission feel that the construction given the Act by this Court and the lower courts is unworkable or improper correction should be made by Congress and not by this Court. The construction of the Act made by

the court below accords with the intention of Congress as set out in the opinions of this Court and should be affirmed.

III.

The Lower Courts Are Properly Applying the Tests Laid Down by This Court in Its Previous Decisions to Determine When the Act Applies; the Court of Appeals for the Fourth Circuit Properly Applied Those Tests in the Case at Bar.

Although this Court has not considered an air brake case since 1920 many such cases have arisen in the lower Federal courts, and where they have arisen the courts, looking at the essential nature of the work done to determine whether a given movement is a switching, classifying, and assembling movement or a transfer or train movement, have decided whether the Act applies to the particular situation before them.

In *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (9th Cir. 1934), *cert. den.* 295 U. S. 752 (1935), *supra*, cars after having been assembled and connected together were moved one and one-half miles and then switched before being taken on a road run. The Ninth Circuit held that the movement prior to the road run was a switching movement, *supra*, at p. 739:

> "Applying the criterion evolved from the decisions of the Supreme Court of the United States that 'the controlling test of the statute's application lies in the essential nature of the work done,' the facts warranted the finding that the crew at the time was engaged in the assembly of cars by means of a series of switching movements, and that at the time complained of the cars had not been assembled into a train to be transferred to [illegible] particular point."

> ". . . [A]fter the engine had transported the cars to the point where the inspectors had discontinued their observations, the switching of cars was resumed . . ."

The movement in the *Great Northern* case is the same as those movements at bar whereby cars were switched from the Allied Chemical plant to the classification yard and there assembled into a train to be hauled to Bellwood, on Seaboard's main line. The essential nature of the work done in the *Great Northern* case was switching; the essential nature of the work done here is switching.

United States v. *New York, Chicago & St. Louis R. Co.*, 77 F. 2d 215 (7th Cir. 1935), involved a movement of one and one half miles over yard tracks. The string of cars was moved intact, but the engine was uncoupled along the route to switch a car not a part of the string. The court looked to the essential nature of the work done, found the work done was switching, and held the movement not subject to the Act.

United States v. *Chicago, B. & Q. R. Co.*, 190 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953), was an appeal from two different lower court decisions combined on appeal involving the same railroad. The movements involved in one case were between one freight yard, where incoming trains terminated and outgoing trains were assembled for yard movement, and an adjacent storage yard, a distance of one and one half miles. The movement involved in the other case was for slightly more than two miles from the freight house, where outgoing cars were picked up, to a point where they were incorporated into trains. No cars were set out or picked up in the movements. The court held that these movements were switching movements and thus not within the Act.

Three recent decisions in Courts of Appeal have held the movements before them, because of distance, hazards, and

similar factors, train or transfer movements and within the Act. *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (1948), *cert. den.* 335 U. S. 870 (1948), *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241 (5th Cir. 1953), and *United States* v. *Thompson*, 252 F. 2d 6 (8th Cir. 1958). The *South Buffalo* and *Thompson* cases do not even refer to the test of looking to the essential nature of the work done to determine whether the particular movements were switching movements, and the *Panhandle* case alludes to the test only perfunctorily. Had they considered this test, it is highly probable different conclusions might have been reached.

But this Court established the nature of the work done as the test in the *Burlington* case, *supra*, and reaffirmed it in the *Louisville & Jeffersonville* case, *supra*. That is the test properly applied by the court below when it said (R. 69):

> "The movements here were not over main line tracks, nor even inter yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make up of others, we are convinced they were switching operations, exempt from the requirement of train brakes."

United States v. *Elgin, Joliet & Eastern Ry. Co.*, 182 F. 2d 1 (7th Cir. 1950), is closer factually to the case at bar than any other case so far decided. That case involved the Joliet's operations in Gary, Indiana. The Joliet's main line tracks end at its Gary yard. The yard is maintained to serve two large industries adjacent to the yard, just as Seaboard's Hopewell yard is maintained to serve the numerous indus-

tries adjacent to its yard. The movements complained of were from one part of the yard to another and involved movements of from 47 to 84 freight cars without air brakes for distances up to 2.1 miles. So far as the record shows there were no cars added or dropped during the movement. The court, in finding these to be switching movements, looked to the nature of the railroad's operations in Gary to see what work was being done (p. 4):

> "It appears to us that the entire business of the Gary Yards, considered as a whole, is in the nature of a continuous switching operation. While it is true that the particular movements singled out here involved cuts of cars moving as units without interruption for distances, which under the circumstances of other cases referred to were held to justify the application of the Act, we think no such occasion arises here for applying the Act. Here we have a large yard divided into a large number of sub-yards, and necessarily, movements within this yard and between the sub-yards involved long hauls. But using the criteria which we think are to be derived from the cases cited, we are convinced that the 'essential nature of the work' remained the 'switching, classifying and assembling (of) cars within railroad yards for the purpose of making up trains' 'for a run or trip along the road' and not such a 'run or trip' as required compliance with § 9 of the Act."

The court below similarly looked at the entire business of the Hopewell yard as a whole, found such business to be switching, and properly excluded the questioned movements from the Act's application.

United States v. *Terminal Railroad Association of St. Louis*, 260 F. 2d 884 (7th Cir. 1958), *cert. pending*, is the most recent appellate decision concerning this part of the Act. Four movements, from one and three-quarters miles

to two and three-quarters miles in length, were involved on appeal. The movements were between two of the railroad's yards preparatory to switching cars to the industries in the area, and in only one of them were any cars set out or picked up. The court held the movements to be switching movements, saying (p. 886):

> "A moving locomotive with cars attached is within the provision of the Act only when it is a train. There is no definition of 'train' in the Safety Appliance Act. However, it has been held that where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up a train, the movement is not a train."

We submit that the Courts of Appeal are not misconstruing this Court's prior decisions, as the Government maintains, but as the foregoing cases show, are correctly applying the Act to the cases before them.

IV.

Whether a Particular Movement Is a Transfer Movement or a Switching Movement Is a Question To Be Determined by the Trier of Fact.

The Government in its brief, after finally recognizing that a distinction is properly made between transfer movements and switching movements (p. 21 et seq.), finds it necessary to lift itself by its own bootstraps and does so by persisting in calling the movements in the case at bar "transfer trains". The Government's argument is that since these are transfer trains the court below erroneously applied the law when it exempted the movements from the Act's coverage. The Government's position would be well taken if the movements were transfer trains, but merely saying they are

transfer trains does not make them transfer trains. The Government fails to do what both the District Court and the Court of Appeals in this case have done: the Government does not look to see what is the essential nature of the work done but looks at only a small, isolated sector of the operation.

The movements complained of are not transfer movements. A transfer movement by its very terms means a movement between two points preceded and followed by other movements. The movements here involved are not movements between two yards, or two terminals, as in transfer movements; they are movements over a lead track, an interchange track and industrial spurs. As expressed by the court below:

> "* * * The lead track, the spurs that break from it and the classification yard are all parts of one yard, and its extremities are not so distant as to deprive a movement from one end of the yard to the other of the flavor of its function in breaking up and making up trains." (R. 68)
>
> "* * * Movement over the lead track, from one spur requiring attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to be dispatched." (R. 70)

That the tests laid down by this Court in all its prior decisions were properly applied below clearly appears from the following language of the Court of Appeals:

> "Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make up of others, &c

> are convinced they were switching operations, exempt from the requirement of train brakes." (R. 69)

The very nature of the railroad industry dictates that each yard is different from any other yard. Thus the facts of each case become of crucial importance, and great weight must be given the decision of the trier of the facts. As was pointed out in *United States* v. *Chicago, Burlington & Quincy Ry. Co.*, 199 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953), *supra*, at p. 226:

> "Neither Congress nor the Interstate Commerce Commission has seen fit to define the meaning of the word 'train' as employed in the Act. This perplexing problem unfortunately, so we think, has been left to the courts. After wrestling with it some fifty years, courts have accomplished little other than to decide on the particular facts of each case whether the movement was that of a train within the meaning of the Act. It is apparent, therefore, that a holding in one case carries little weight as a rule for decision in another. Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make the decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another."

District Judge Hutcheson, the trier of the facts in this case, sitting without a jury, found that the movements complained of by the Government were switching or shifting movements and did not constitute violations of the Safety Appliance Act.

To support the allegations of the complaint, the Government produced two witnesses both of whom were employed

by it as Inspectors of Safety Appliances for the Interstate Commerce Commission, Charles R. Meyrick, with two and one half years' service (R. 16), and Chester E. Roy, with six years' service (R. 41). Inspector Roy did not testify at length but merely said, "My testimony will substantiate his (Inspector Meyrick's) testimony in regard to these particular movements, but there are one or two items that I would not substantiate; that is, all these various questions" (R. 42).

As to the facts with regard to the location of the tracks, industries, crossings and the movements involved there was no material difference between the evidence for the Government and that for the railroad.

Rather the difference was in the conclusions drawn from that evidence by the two Government inspectors and the expert witness for the railroad, Mr. Joseph R. Hoag, who prior to his retirement had been an Inspector of Safety Appliances for the I. C. C. for thirty-two years.

His duties with the I. C. C. were the same as those of the Government's witnesses, Messrs. Meyrick and Roy, but he had the advantage over them of enforcing the provisions of the Safety Appliance Act for nearly four times as long as the combined service of both of the Government witnesses.

The basis for his conclusion that movements in the Hopewell yard similar to those here in question were switching movements are concisely stated in his testimony at p. 50 of the transcript as follows:

> "Q. What were the factors that led you to that conclusion?
>
> "A. Well I figured it was merely a switching movement for the distribution of cars to the different industries around Hopewell and was controlled by yard speed, which was a speed that enabled them to stop

within one-half the range of vision. I believe two railroads crossed at grade. Those railroads were spur tracks of the other line and they were protected by fixed signals, namely, a stop board on that line where their trains had to stop before crossing over the Seaboard tracks; the Seaboard had the right of way. The most important crossing was protected by gates. The other crossings were protected by railroad crossing signs, what we call cross-buck signs, and the speeds being so slow and the number of cars—I asked about the average number of [fols. 114-115] cars that were handled in the train and they said it would run around twenty-five cars, the average number, and moving at yard speed. I figured the engineman could control the speed of the train and stop within one-half his range of vision and there would be no danger in the movement."

It is striking that the Government in its brief takes no issue with any finding of fact by the trial court.

Rule 52, Federal Rules of Civil Procedure, provides, in part:

"Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses. . . ."

The Government fails to point out any single one of Judge Hutcheson's findings of fact is erroneous and in what respect it may be in error. If the findings of fact are correct and supported by the evidence, then it must follow that the Court of Appeals for the Fourth Circuit properly affirmed the trial court, for the determination of what work a given

movement is performing is a question of fact, and what work is performed is the test of the Act's applicability.

The Government maintains that the court below erred by abandoning the test of whether a train was involved and instead deciding the case on the absence of main line tracks and on specific elements of danger. We submit that the court below did not decide the case on those issues but instead properly decided the case on the basis of the tests laid down by this Court when it said (R. 69):

> "The movements here were not over main line tracks, nor even inter-yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. *Since the nature of the work done was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make-up of others, we are convinced they were switching operations, exempt from the requirement of train brakes.*" (Italics supplied.)

With respect to the decision in favor of the railroad in the Court of Appeals, let us point out that Chief Judge Sobeloff concurred with the majority as to one of the movements involved, Count 3, and dissented as to three, Counts 1, 2 and 4. As to Count 3, he concurs with the majority but nowhere in this dissent is there one word to be found as to the basis of the distinction which he makes between the movement involved in this count and those involved in the other three! The only clue is to be found in a foot note where it is said:

> "Although there was a conflict in the evidence whether one or two of the movements were interrupted by switching operations en route, the District Judge

resolved the conflict by finding a stop for switching in only one of the four, the one alleged as the third violation." (R. 73)

The dissenting opinion below is based almost entirely on a consideration of the hazards involved in Seaboard's Hopewell operations. Totally aside from the fact that the record discloses a remarkable safety record and that the movements would not have been less hazardous to employees or the public if air brakes had been used, the presence or lack of hazard has never been the controlling test of the Act's application. Yet the Government itself contends that it is erroneous to consider elements of danger (Br. 44 et seq.). The dissenting opinion errs in failing to look to the nature of the work done and instead making the test of the Act's application the hazard involved in a particular movement. The majority opinion correctly points out (R. 70) that a switching operation does not cease to be a switching operation merely because it crosses a highway or spur track.

From the time of the construction of the Hopewell line in 1931 or 1932 (R. 49) until September 7, 1951, air brakes were not used on these movements. Their use was discontinued "mostly for operating reasons" January 10, 1950 (R. 50). Yet there is nothing to show that at any time during this period the Government considered similar movements as "train" movements within the prohibition of the Safety Appliance Act.

Likewise, it appears that daily "ten moves are made between these various industrial locations and the yard" (R. 51). I. C. C. Inspectors Meyrick and Roy were here for two days. Yet of the 20 movements which the inspectors should have observed in those two days the Government filed suit with respect to only four. Is it unreasonable to

inquire as to why and wherein lay the distinction from the other sixteen?

A few words in a speech or a book lifted out of their context may have a meaning diametrically opposite that of the author. In this case the Government lifts out of its context the movement between the classification yard and delivery to the industrial spurs, ignoring the shifting that occurred at both ends beyond the arbitrary points selected by it and, in one case, in the middle of one of these alleged "train" movements.

We submit that Judge Hutcheson's findings, far from being clearly erroneous, are plainly right. They were affirmed by the Court of Appeals for the Fourth Circuit in a thorough and well reasoned opinion, and they should be affirmed by this Court.

CONCLUSION

This Court in its prior decisions has held that movements whereby railroad cars are switched, sorted, classified or assembled are not trains, as that word is used in the Safety Appliance Act. Consequently, cars in such movements are not required by the Act to have their air brakes coupled for operation. In order to determine whether a particular movement is a switching movement the essential nature of the work done in the whole movement—not just a part of it—must be considered. This interpretation of the Safety Appliance Act is in accord with the will of Congress in enacting the Act. The Act was never intended to encourage featherbedding, to require railroads to hire men where none were needed.

The District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit in affirming

CONTINENTAL CAN CO.

END SAL - MP 23+5205

PARCEL NO 4

PARCEL A

LEAD TRACK TO CONTINENTAL CAN CO.

PARCEL NO 3

PARCEL B

LEAD TRACK TO ALLIED CHEMICAL AND DYE CO.

ROAD CROSSING STD. FIXED SIGNS

PARCEL NO 1

PARCEL C

ROAD CROSSING STD. FIXED SIGNS

PARCEL D

ROAD CROSSING STD. FIXED SIGNS

ROAD CROSSING MANUAL GATES

MP 23

TRACK 5
TRACK 3
HOPEWELL YARD

PARCEL T

PARCEL F

ROAD CROSSING

PARCEL H

PARCEL E

ROAD CROSSING STD. FIXED SIGNS

LAYOUT
HOPEWELL, VA.

SCALE : 1" = 200'

PART OF CHIEF ENGINEER'S DWG. 12081